Nos. 2209, 2210, and 2211.

# UNITED STATES CIRCUIT COURT OF APPEALS

## FOR THE NINTH CIRCUIT

THE UNITED STATES OF AMERICA,
Appellant, No. 2209

vs.

William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, and Frank W. Kettenbach, Appellees.

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THE UNITED STATES OF AMERICA,
Appellant, No. 2210

vs.

William F. Kettenbach, George H. Kester, Clarence W. Robnett, William Dwyer, The Idaho Trust Company, a Corporation, The Lewiston National Bank, a Corporation, The Clearwater Timber Company, a Corporation, Elizabeth W. Thatcher, Curtis Thatcher, Elizabeth White, Edna P. Kester, Elizabeth Kettenbach, Martha E. Hallett, and Kitty E. Dwyer, Appellees.

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THE UNITED STATES OF AMERICA,
Appellant, No. 2211

vs.

William F. Kettenbach, George H. Kester, and William Dwyer, Appellees.

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Supplemental brief for Frank W. Kettenbach, Appellee in No. 2209, and for Clearwater Timber Company, Idaho Trust Company, and Lewiston National Bank and Potlatch Lumber Company, Appellees in No. 2210.

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Appeals from the District Court of the United States for the District of Idaho, Central Division.

## INDEX.

I.

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Supplemental brief of James E. Babb, Solicitor for Clearwater Timber Company, Idaho Trust Company, Lewiston National Bank, Frank W. Kettenbach and Potlatch Lumber Company, Appellees.

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Appeals from the District Court of the United States for the District of Idaho, Central Division.

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The court may remember that on the oral argument we called attention to the absence of anything in the opening

oral argument on behalf of appellant, touching any of the appellees represented by the solicitor presenting this brief, and that we stated that we would therefore make no reference thereto and that we did not do so. Leave was given all appellees to submit additional briefs on account of appellant's delay in serving appellant's brief, and an additional brief was submitted by other appellees only, to which appellant has filed a brief, designated a "reply," but which opens up again upon the appellees represented in this brief, and in addition proceeds to make new points not before made. This "reply" brief came in just as writer hereof was leaving for Washington, D. C., where he has been daily engaged since, and is still engaged, and where must now prepare this rather than wait till return to Idaho. A copy hereof will be served and we respectfully solicit the court's attention to the following:

I.

The author of this brief is not aware of what affidavits of improper conduct of Government representatives are in this case referred to on page 3 of said reply brief, but disagrees with the suggestion that all evidence bearing upon intimidation of witnesses and contradictory statements of witnesses be ignored, because such conditions have been shown previously. Each additional time such showing is made, strengthens the demand that it be noticed, and in this case, above all others—one in equity where the proof must be so clear and satisfactory—a case where coercion and contradictory statements, and testimony delivered by a large embezzler with hope of immunity, receiving a pardon therefor. No person can doubt that the pardon was fully understood to be a condition of the testimony given in this case—something permissible in a criminal case, but

not in a civil case. Of this pardon the Governor of Idaho, Hon. James H. Hawley, in a proclamation addressed "To the People of Idaho," and published in the daily papers of November 15, 1911, said: "No act ever done in connection with the courts of Idaho has so brought justice into disrepute."

Note also the opinion of Attorney-General Wickersham of May 10, 1912, concerning the pardon of Jones, of Oregon, and the practices of United States prosecutors there disclosed, and does it not appear that the request that all such evidence be simply ignored (always improper), is especially inopportune, and is it not only by a certainty, that the ear of the court is not deaf thereto that such practiced will end, and evidence thereof cease to come forward?

## II.

### Speculation.

The point that the prohibition of purpose to take the land "for sale" in the bill discussed in the discussion set forth in appellant's first brief was omitted from the bill later introduced and passed rather than stricken by amendment from the original bill, after that discussion is not important, since in each case it is true that the discussion quoted pertained to a bill containing the prohibition, and not to the bill passed, which omitted it.

The shifting of appellant's position could only be established by the briefs below which are not in the record. The brief of the same counsel in this court in the Barber Lumber Company case, 172 Fed., 948, will show how he formerly presented a similar case.

## III.

### Antecedent Agreements.

U. S. *vs.* Betts, 192 Fed., 708, cited, was not similar to this case. There was no uncertainty in the evidence. No improvements at all were made on the homestead claims and claimants were only on the claims two or three times not to exceed a "few hours" and "defendant was the only person vitally interested in procuring the titles," he having a large sheep range he was protecting from encroachment. Nor is U. S. *vs.* Smith, 181, Fed., 545, cited similar. There the defendant "*caused* . . . the applicants to be advised . . . they would receive . . . the stipulated sum . . . and they acted on such understanding in making the application, and subsequently conveying the property."

## IV.

### Hanson Entry.

*While These Appellees are not Interested in This Particular Entry, it is not to Their Interest That a Serious Error as to Any of Them Stand Uncorrected.*

On page 26 of appellant's brief is a reference to the Hanson entry. We would not consider it worthy of notice, were it not for the fact that an effort is made to show a variance between the answer of the appellees and the evidence, and for the reason that counsel has not given to the court all of the facts in relation to this entry, especially the occurrences subsequent to the filing of the answer. The answer was filed on April 15, 1910 (page 4480 of the record), and on pages 4447, 4448, and 4449, is the answer

in relation to the Soren Hanson claim. On pages 4447-4448, in relation to this claim, the defendants state:

> ". . . admit that the said Soren Hanson made entry of a certain described tract of public land, as alleged in complainant's bill in equity, and deny that he, the said Soren Hanson, did thereafter convey the same to the defendant, William F. Kettenbach, subject to a mortgage previously by the said Soren Hanson made to the defendant Curtis Thatcher, which mortgage appears on the land records of Nez Perce County, wherein the said land is situate, and that the same has not been released."

At page 523 of the record the witness Hanson testifies:

> "Mr. GORDON: Q. Now, the third deed that you identified, dated March 5, 1909, running to William F. Kettenbach, what was the circumstance of your executing that deed?
>
> A. Why, that is after—I didn't send that other deed down to Robnett. I went down myself, and me and my wife to Lewiston, so I just took it in and handed it to him and he said—well I don't remember what his explanation was, but anyway he wanted another deed instead of the one I made out for Thatcher; he wanted another one, and so he had another deed there, and he sent a notary public up to my wife's; she was up to her mother's house, and had her acknowledge that other deed, and I kept the first deed to Thatcher.
>
> Q. Now, do you remember to whom that deed ran?
>
> A. The second deed?
>
> Q. The one you have just referred to.
>
> A. Yes, that was to the Clearwater Timber Company.
>
> Q. When was that? After you had executed the other three deeds?
>
> A. The other two, the deed in blank and the deed to Thatcher.

Q. And you executed another deed before you did this one to Mr. Kettenbach, is that right?

A. Yes, sir, to the Clearwater Timber Company.

Q. And was that the one you say that you executed down here at Lewiston?

A. Yes, sir.

Q. And you say Mr. Robnett attended to that for you?

A. Yes, sir.

Q. And then he sent this deed to William F. Kettenbach to you, as I understand?

A. Yes, he wrote to me afterwards again and told me there was a—I forget now whether it was a mistake—but anyway he wanted another deed.

Q. And that was the one? He sent this one to Kettenbach up to you?

A. Yes, he sent that up to me."

So it appears that this deed referred to was never delivered to Mr. Kettenbach; that it was executed by Hanson, at the request of Robnett, and was subsequently by Robnett returned to Hanson, and it was never delivered to Kettenbach. This evidence is not in conflict with the facts, but the brief of counsel would cause the belief that Kettenbach received the deed from Hanson, then denied that it was ever received by him. This statement is unfair, and should not have been made. With this argument, the court should have all the facts.

Counsel also contends that the witness Kettenbach denied that he had any interest in the land, and admitted on the stand that he had. This portion of the denial is referred to at page 4449 of the record, wherein Kettenbach, in his answer, states; after denying any unlawful combination, conspiracy, design, or purpose, the answer states:

". . . or the land or the title thereto, alleged in complainants' bill in equity to have been conveyed as aforesaid by the said Soren Hanson to the said

William F. Kettenbach, and deny that the said land was ever by the said Soren Hanson conveyed to the defendant William F. Kettenbach; deny that the defendant William F. Kettenbach has any interest therein, and deny that the said land was entered by the said Soren Hanson in the, or any, unlawful, corrupt, or fraudulent manner, as alleged in complainant's bill in equity, or in respect of all of the lands set out in said bill, or in furtherance of the conspiracy charged in complainant's bill in equity, or the title to the said land thus entered by the said Soren Hanson is invalid, obtained in fraud of the law, or voidable at the suit of the United States, but admit that the said various transferees had notice and knowledge of the issuance of patents to the said lands."

We have heretofore observed that the answer was filed on April 15, 1910. Mr. Kettenbach states that he was only acting as agent, or as a vendor as he stated, and claimed no interest in the land at the time the answer was filed. At pages 1691-1692 the witness testifies:

"A. Well, as I was going along with the abstract, I had ordered the abstract made up, and after I had paid the mortgage, and paid Robnett to pay Hanson I got the abstract, and then I found that there was a lis pendens on the claim, which was a surprise to me. I didn't know anything about that. I figured that the only suits there were were on our own lands, and I ran on to this lis pendens. And in the meantime, Brown had given me a deed, drawn up—they have a separate form of deed, different from anybody else—and he had given me one of their deeds to have him execute, and this deed was executed, and if they was paying all the money and everything the claim was to go to Brown. Of course, I was acting in the position of a vendor, you might say, but I was paying out my own money and doing all this, and when it was turned over to Brown I was to get my

money back. Well, as I say, as soon as I got the abstract I noticed this lis pendens, and I went to Brown and I told him, I says, 'Brown, here is a lis pendens; I didn't know it until I got the abstract." He says, 'the claim has never belonged to us, and it must be a mistake that they are suing on that claim,' and I says, 'couldn't you take it to your attorney, and find out?' and he did that; and then, of course, he couldn't take it.

Q. Then you asked for a deed to yourself?

A. Then I asked for a deed to myself.

Q. And you prepared the deed?

A. I prepared the deed, and gave it to Mr. Robnett.

Q. And that is the deed that was offered here in evidence, wasn't it?

A. Well, I didn't know it had been offered in evidence. But the condition was this: It was just about that time, Mr. Gordon, where things got to that stage where this bank trouble came up, the first exposure of the thing, and I had my money tied up in it, and I felt that Robnett was naturally not interested in me any more, or in us, and it seemed apparently he had not been for quite a while, and I was there with my money out, and nothing to show for it. There was no reason why Robnett could not have gone to Hanson and got a deed to myself, so I took the matter in my own hands, and on my own volition I took the deed I had used, conveying the land to the Clearwater Timber Company, and put that on record, feeling that I could go to them and that they would quitclaim back to me, and in that way I could protect myself, and that is the reason I did that."

It thus appears that Mr. Kettenbach had asked for a deed to himself, and had drawn it up, and had it sent to Hanson for execution, and it was never delivered to Kettenbach, and it was by Robnett returned to Hanson. This must have been very late in the proceedings, and it does not

appear from the record just what date this occurred, but the record shows that the deed from the Clearwater Timber Company to Kettenbach bears date July 27, 1910, but this deed was never delivered, and Kettenbach did not know that it was executed until it was brought out in evidence during the trial. It is clear, however, that Kettenbach never claimed any interest in the land whatever until after the answer was filed, and until it developed that the lis pendens covered this particular tract of land as well as other lands, and that it could not be purchased by the Clearwater Timber Company, and that Kettenbach could not obtain the delivery of the deed from Hanson to himself, and he simply put the deed to the Clearwater Timber Company on record as a matter of protection, as he had advanced the money to pay the mortgage to Curtis Thatcher and also to pay to Hanson. He simply held the same (without arrangement therefor) as a matter of security, and he has not as yet in reality obtained title to the land. It still stands of record, in the name of the Clearwater Timber Company, without consent of the timber company; but in view of the fact that these matters all occurred subsequent to the filing of the answer, and that Mr. Kettenbach went upon the stand and gave a full and complete history of the entire transaction, concealed nothing, evinces his good faith, and that he did not in any way or manner attempt to state in his answer anything contrary to the facts. A careful examination of the entire matter discloses that the answer is not in conflict with the facts as they existed at the time of the filing of the bill in equity and at the time of preparing the answer. As a matter of fact it does not appear from the record just how long the answer was signed before it was filed. Justice to the defendants requires consideration of the forgeoing.

V.

**Opportunity of Court Below to See and Hear the Witnesses.**

On page 34 of counsel's brief is a reference to certain witnesses who did not appear and testify in the criminal actions against the defendants, Kester, Kettenbach, and Dwyer, involving the land in question. While it may be true that these witnesses did not appear and testify in these criminal actions, yet their evidence has but little weight in determining the questions at issue. The most important witnesses appeared in the criminal trials, and compared with the number not appearing, those not appearing would be small. The witnesses, Washburn, Hattie Rowland, Pierce, Hyde, Evans, Bishop, Dent, and Smith, did not appear in these cases, and when you consider the fact that the witnesses, Alexander, Atkinson, Bartlett, Joel R. Benton, Brown, Carey, Chandler, Chapman, Clausen, Comerford, Cornell, Dowd, Dreckman, Mrs. Kittie E. Dwyer, Ferris, Flood, Fralick, Gammon, Gatch, Goodwin, Gregory, Haevernick, Hutchins, Jackson, Jenson, Kester, William F. Kettenbach, Lafferty, Lambdin, Hiram F. Lewis, Edward M. Lewis, George W. Lewis, Molloy, F. D. Morrison, Peffley, Parker, Robnett, Roos, Shaeffer, Sherburne, Edward C. Smith, Charles W. Taylor, Edgar J. Taylor, Paul H. Waldman, Robert O. Waldman, Walter Williams, Ella Wilson, Guy L. Wilson, William B. Benton, J. M. Bradbury, C. W. Colby, William Dwyer, Fred W. Emery, Martin L. Goldsmith, Masters, Schultz, Thatcher, and West, testified at the previous criminal trials, it makes the number of witnesses who did not testify at the previous trials, appearing on page 34 of appellant's brief, appear infinitely small.

Counsel's contention that by reason of the court having examined the evidence only, no weight should be given the

appellees' contention that the court, having observed the witnesses' manner of testifying upon previous occasions, should have as much weight as though the court heard the evidence in this cause. In view of the fact that the additional witnesses used in the present case are so few, and their evidence of so little importance, we believe that if the court will turn to the evidence of these various witnesses it will arrive at the conclusion that the evidence of these witnesses strengthens the appellees' case instead of weakening it or aiding the appellant. The evidence of Mrs. Maris shows conclusively that the appellees had nothing at all to do with the entry until long after final proof was made. The evidence of Robinson and Nelson supports appellees' contention. The evidence of Hanson we have heretofore referred to. The evidence of Little, Harrington, Pierce, Bashor, and Long strengthens the case of the appellees. The witness, George Morrison, did not appear and testify in this case. The witness Hyde did not appear and testify. The witness Evans was dead at the time of the trial and did not testify in either case. The evidence of Bishop does not strengthen the appellant's case. The evidence of Newmann, Dent, Smith, Dammorell, Bingham, Edna P. Kester, Elizabeth Kettenbach, Elizabeth White, William J. White, Mamie P. White, Martha E. Hallett, Daniel W. Greenburg, William McMillan, and Drury M. Gammon does not strengthen the appellant's case. The witness, Hattie Rowland, did not appear and testify. Therefore, out of the few witnesses referred to on page 34 of appellant's brief, as having testified in this case, who did not testify in the criminal cases tried before Judge Dietrich, the witnesses, Washburn, Pierce. Hyde, Evans, Bishop, Dent, Smith, and Rowland, did not testify in this cause at all, and counsel is in error wherein he states they did testify in this case.

## VI.

### Idaho Trust Company.

The motion for change of venue referred to at pages 30-31 Reply Brief, was based on public rumors which would cause *suspicion* and bias, yet neither rumors nor could *suspicion* only prevent one from being a bona fide purchaser (Babb's Brief, pp. 56-63). The fact that Frank W. Kettenbach testified to some fact of narrow compass in one of the land fraud trials, certainly charges him with no notice concerning any entries not involved in that case, nor can it be presumed from the mere fact that a person testifies to some fact in a case that he knew all about the case, and the other facts therein.

## VII.

### Clearwater Timber Company.

The date of patent to Joel H. Benton, given page 27 of our brief as February 25, 1905, should have been the same date in 1904, and in the claim of title of the W. B. Benton claim, page 24 of our brief, should have appeared the mortgage from Robnett to Guernsey for $3,000, and the release thereof.

Look at the chain of titles, pages 24-30 of our brief, and see what there is to put us on inquiry, when all the facts are considered, pages 33-45 our original brief.

There is nothing to show that Brown or any person but Davies in Spokane saw the chain of title in any of the cases that made any progress toward a contract.

As to the Hanson and other claims, *after all the deals on all titles bought were closed*, Brown learned from the newspaper or Kettenbach that a lis pendens was pending, before negotiation had progressed to a bargain or the securing of an ab-

stract of title, and was advised that with a lis pendens pending it would be futile to go further—this after all deals were closed for the titles bought and therefore can have no bearing thereon.

Respectfully submitted.

JAMES E. BABB,
(P. O. Lewiston, Idaho)

*Solicitor for Idaho Trust Company, Lewiston National Bank, Frank W. Kettenbach, Clearwater Trust Company, Potlatch Lumber Company, Appellees.*

UNITED STATES OF AMERICA,
*District of Columbia,*
*City of Washington,*

James E. Babb being first duly sworn on oath says that he sealed a full true and correct copy of foregoing brief in an envelope and legibly addressed the same thus, "Peyton Gordon, care of Department of Justice of United States, Washington, D. C., and stamped thereon sufficient United States postage stamps to entitle it to delivery by United States Mail, and deposited the same on the 28th day of May, 1913, in United States Post-Office, in said city of Washington, said address being then correct, and said Gordon then having an office in said Department of Justice.

Subscribed and sworn to before me, this 28th day of May, 1913.

*Notary Public.*